

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 17, 2016

v

ROBERT LEROY ELING, III,

Defendant-Appellant.

No. 328194
Wexford Circuit Court
LC No. 2013-010874-FH

Before: GLEICHER, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM.

Defendant pleaded guilty to violating his sentence of probation for two narcotics-related crimes. The trial court imposed a departure sentence for one of the underlying convictions. Defendant challenges his within-guidelines sentence as disproportionate, asserts that the trial court's use of judicially-found facts to score the sentencing guidelines contravened *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), and contends that the trial court neglected to articulate a legally adequate reason for its decision to depart from the guidelines. We reject these arguments, but must remand for further proceedings pursuant to *People v Steanhouse*, ___ Mich App___; ___ NW2d ___ (Docket No. 318329, issued October 22, 2015).

I

Defendant initially pleaded guilty to possession with intent to deliver less than 50 grams of a controlled substance, MCL 333.7401(2)(a)(iv), and possession of less than 25 grams of a controlled substance, MCL 333.7403(2)(a)(v). The trial court sentenced defendant to 365 days in jail with credit for 120 days served and two years of probation. Defendant failed to report to his probation officer as required and committed additional drug-related felonies while on probation.

After waiving the assistance of counsel, defendant pleaded guilty to violating the terms of his probation. The trial court sentenced him to concurrent prison terms of 23 to 240 months for possession with intent to deliver less than 50 grams of a controlled substance and 23 to 48 months for possession of less than 25 grams of a controlled substance. The latter sentence constituted a 12-month upward departure from the sentencing range calculated by the probation department. The trial court expressed that "substantial and compelling reasons" supported a departure sentence "in light of the probation violation." Defendant raised no objection to the guidelines' calculation or his sentence in the trial court. We granted defendant's delayed

application for leave to appeal. *People v Eling*, unpublished order of the Michigan Court of Appeals, entered August 12, 2015 (Docket No. 328194).

II

Defendant objects to his within-guidelines sentence for possession with intent to deliver less than 50 grams of a controlled substance, MCL 333.7401(2)(a)(iv), contending that it qualifies as constitutionally disproportionate under the United States and Michigan Constitutions. We must presume that a sentence within the sentencing guidelines is proportionate. *People v Bowling*, 299 Mich App 552, 558; 830 NW2d 800 (2013). To overcome that presumption, “a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate.” *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000).

Defendant asserts that his sentence “at the top end of his sentencing guidelines range . . . left insufficient room within which the judge could more severely sentence an offender who fell within the same guidelines range with higher point totals, or who violated his probation in a more severe fashion.” While defendant’s statement is accurate, it elides the legal standards governing proportionality review. We discern nothing in the circumstances of defendant’s crime or his background that shifts this case into the realm of the unusual. Defendant admitted to having possessed and delivered methamphetamine. While on probation he committed additional controlled substance crimes. He has offered no meaningful explanation as to how or why his particular sentence contravenes proportionality principles. Accordingly, we conclude that defendant’s 23-month sentence passes constitutional muster.

III

Steanhouse, which similarly involved a departure sentence and a guideline score predicated on judicially-found facts, controls the balance of this case.¹ As in *Steanhouse*, we review defendant’s departure sentence for plain error affecting substantial rights, as defendant did not preserve an objection to the guidelines’ scoring or the departure in the trial court.

¹ Arguably, defendant admitted to the conduct described in the only offense variable actually challenged on appeal, OV 14. Had the trial court assessed zero points for this OV, defendant’s recommended minimum sentence for his violation of MCL 333.7401(2)(a)(iv) would drop from 5 to 23 months to 0 to 17 months. However, we need not consider whether the trial court’s scoring of OV 14 runs afoul of *Lockridge*, as *Steanhouse* compels a remand conducted along precisely the same lines as would a remand based on a *Lockridge* violation. Both as to the departure sentence and the potential Sixth Amendment violation embodied by the scoring of OV 14, the trial court must determine whether it would have imposed a materially different sentence in light of *Lockridge*.

Steanhouse, ___ Mich App at ___, slip op at 21. And as this Court held in *Lockridge*, because defendant received a departure sentence, he cannot establish plain error. *Id.*²

Nevertheless, defendant is entitled to review of his departure sentence for reasonableness. *Lockridge*, 498 Mich at 392. In *Steanhouse*, this Court declared that a departure sentence is “reasonable” if it fulfills the principle of proportionality articulated in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), and its progeny. *Steanhouse*, ___ Mich App at ___, slip op at 24. This determination must be made, in the first instance, by the trial court. The remand procedure described in *Lockridge* and modeled on *United States v Crosby*, 397 F3d 103 (CA 2, 2005), applies. Because the trial court did not have the benefit of *Lockridge* or *Steanhouse* when it imposed defendant’s sentence, we remand for further proceedings pursuant to *Steanhouse*. Defendant may elect to avoid resentencing by promptly notifying the trial court that he declines this option. *Steanhouse*, ___ Mich App at ___, slip op at 25.

We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Michael J. Kelly

² Defendant asserts that resentencing is required because the trial court failed to articulate “sufficiently valid objective and verifiable” grounds for its departure. However, “[b]ecause a trial court is no longer required to provide a substantial and compelling reason for a departure from the sentencing guidelines under *Lockridge*,” we need not review defendant’s argument regarding the adequacy of the trial court’s expressed sentencing logic. *Steanhouse*, ___ Mich App at ___, slip op at 21 n 14.